No. 815

In the Supreme Court of the United States

OCTOBER TERM, 1951

HAROLD GROSS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX

LOUIS F. OBERDORFER

JOSEPH M. HOWARD
BURT J. ABRAMS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–4a) is reported at 286 F. 2d 59.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1961 (Pet. 1a), and a petition for rehearing was denied on February 21, 1961 (Pet. 10a). The petition for a writ of certiorari was filed on March 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether venue was properly laid in the Southern District of New York.

2. Whether the trial court erred in refusing to give certain instructions requested by petitioner.

3. Whether the trial court should have more extensively defined the term "income" for the jury.

4. Whether a comment by the United States Attorney, after defense counsel had elicited an answer damaging to petitioner's case, constituted grounds for a mistrial.

5. Whether the trial court erred in its responses to questions submitted by the jury.

STATUTES INVOLVED

18 U.S.C.:

> SEC. 3237. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.
>
> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> * * *

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

Petitioner was indicted on six counts alleging the willfully attempted evasion of his individual income taxes by causing false and fraudulent income tax returns to be prepared in the Southern District of New York for the years 1953 through 1958, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the 1954 Code. At his first trial, petitioner was convicted on all six counts, but the court of appeals reversed and ordered a new trial on the ground that the trial court had committed reversible error in compelling petitioner to answer certain questions on cross-examination. *United States* v. *Gross*, 276 F. 2d 816 (C.A. 2). At the same time, the court of appeals rejected petitioner's contention that venue should have been laid in the Eastern District, rather than in the Southern District, of New York (Pet. 5a–9a). This Court subsequently denied petitioner's petition for certiorari on the venue question. *Gross* v. *United States*, 363 U.S. 831.

Upon retrial, petitioner was convicted only on Counts II and III which charged, *inter alia*, that the taxpayer had understated his income by the amount of $6,500 in each of the years 1954 and 1955. At to those years, the government offered evidence (a) that petitioner had received payments of $2,500 for assisting his employer, Neo-Gravure Printing Company, in bargaining negotiations with the union representing Neo-Gravure's platform workers, and (b) that he had received additional payments of $4,000 for preventing work stoppages feared if truck

drivers of the New York Journal American attempted to make pick-ups of the American Weekly at Neo-Gravure's loading platform. Petitioner was acquitted on Counts I, IV, V, and VI, relating to years for which only the $4,000 payments were alleged. (Pet. 1a.) The court of appeals, in a *per curiam* opinion, affirmed the convictions on Counts II and III (Pet. 2a–3a).

ARGUMENT

1. As twice held by the Second Circuit (Pet. 1a–4a, 5a–9a), petitioner's venue argument is without substance. The criminal penalties provided in Section 7201 of the 1954 Code, *supra*, p. 2, are applicable to "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title * * *." The record shows that petitioner's income tax returns for each of the years 1951–1958 were prepared by his accountant, Michael Pinto, at Pinto's office in the Southern District of New York. For each year, Pinto prepared the return on the basis of information supplied by petitioner with respect to his income and expenses. Petitioner's initial contact with Pinto was in 1952 when he personally appeared at Pinto's office and there turned over the information from which his 1951 return was compiled. In subsequent years (including the years covered by the indictment, 1953–1958), petitioner mailed the information to Pinto's office. (R. 6a–11a.)[1] The proof thus substantiated what the indictment alleged, *viz.*, that one of the means

[1] Record references are to the government's appendix in the court of appeals.

by which petitioner attempted to evade his income taxes was that he caused false and fraudulent tax returns to be prepared in the Southern District of New York. It is of no consequence that another aspect of the attempted evasion, the filing of the returns, occurred in the Eastern District of New York. The applicable venue statute (18 U.S.C. 3237, *supra*, p. 2) provides that an offense "begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Here, as the Second Circuit has observed (Pet. 9a; see also Pet. 1a), it "cannot be said the crime was neither 'begun' nor 'committed in part'" in the Southern District; hence it constituted one of the two districts in which venue properly lay. Cf. *United States* v. *Johnson*, 323 U.S. 273; *United States* v. *Albanese*, 224 F. 2d 879 (C.A. 2), certiorari denied, 350 U.S. 845; *United States* v. *Miller*, 246 F. 2d 486 (C.A. 2), certiorari denied, 355 U.S. 905; *Travis* v. *United States*, 364 U.S. 631.

2. There is no merit in the assertion that the trial court committed reversible error in refusing to give certain instructions which petitioner maintains embodied his "Theory of Defense." (Pet. 9.) The court charged the jury, in part, as follows (Pet. 11, 2a):

> If you find that the defendant received the sums alleged in the indictment and retained a substantial portion for his own account, which he wilfully failed to report, he then may be found guilty of the crime charged notwithstanding he may have passed on to others a portion of the monies received.

This instruction clearly stated the factual criteria necessary to the determination of petitioner's guilt or innocence—namely, whether petitioner had in fact received the amounts alleged in the indictment, and, if so, whether he had retained a substantial portion thereof for his own account. The giving of the additional charges requested by defense counsel would have been unnecessarily repetitive and even misleading. For example, one of the requested charges was (Pet. 3a):

> If you find that the defendant received the money, but that the defendant did not retain the money for his own use, then the money received did not constitute income to the defendant, and you must find the defendant not guilty.

This charge implies that *all* the payments which petitioner allegedly received—*i.e.*, the $2,500 payments as well as the $4,000 payments—might have been passed on by petitioner to others. As the court below pointed out, however, "there was no evidence even suggesting that defendant had not retained the two $2,500 payments if he had received them." (Pet. 3a.) Consequently, it would have been misleading to give this charge, and it was correctly refused. See *Elwert* v. *United States*, 231 F. 2d 928, 938 (C.A. 9).

Defense counsel then made the following request (Pet. 3a):

> * * * that if the jurors find that he received the money, that he did not retain the money for his own use and it was paid to someone

else, that the charge be confined to the $4,000 payments and not the $2,500 payments.

It is difficult to perceive how petitioner could have been prejudiced by the refusal to give this charge when the instruction actually given by the trial court plainly stated that the jury could find petitioner guilty only if it first found that he "received the sums alleged * * * and retained a substantial portion for his own account." Moreover, the verdict itself indicates that no prejudice occurred. Petitioner's proof "that he did not retain the money for his own use" was limited to the $4,000 payments, and he was in fact acquitted on the four counts which alleged only those payments. (Pet. 1a.) The "guilty" verdicts, on the other hand, were based solely on the two counts which also alleged the $2,500 payments, and as to those payments there was no evidence even remotely suggesting non-retention. (Pet. 2a–3a.)

3. Petitioner's contention that the trial court should have more extensively defined the term "income" for the jury is unsound. There was no issue in this case as to whether or not the payments in question constituted "income" to petitioner, except insofar as petitioner may have passed the payments on to others. That possibility, in turn, was amply covered by the trial court's instruction that petitioner could be found guilty only if the jury first determined that he had retained a substantial portion of the payments for his own account.

4. The trial court correctly denied petitioner's motion for a mistrial. As the court noted (Pet. 19),

the witness' answer was "totally responsive" to the question asked. If any damage resulted to petitioner's case, it flowed directly from the answer elicited by defense counsel's typically broad question, and not from the comment of the United States Attorney.

In any event, the trial court scrupulously protected petitioner's interests by ordering that the comment be stricken and by instructing the jury to disregard it. In these circumstances, petitioner's claim of prejudicial error is groundless.

5. The trial court correctly and responsively answered the jury's questions. The jury first inquired (Pet. 20–21) whether it could render a verdict separating the $4,000 and $2,500 payments on which Counts II and III each were based. To this the court replied (Pet. 20) that there would be a sufficient basis for finding petitioner guilty on any count of the indictment if he had willfully failed to report a "substantial part" of the income alleged in such count. This response correctly framed the legal issue for the jury (*United States* v. *Nunan*, 236 F. 2d 576, 585 (C.A. 2), certiorari denied, 353 U.S. 912) and thereby avoided the very result which petitioner feared—namely that Counts II and III would be "emasculated" (Pet. 21) by separate verdicts as to each component payment. Petitioner could not conceivably have been prejudiced by the court's response.

The second question asked by the jury was whether the court could give a "legal interpretation of what constitutes a substantial amount with regard to

Counts 2 and 3." (Pet. 21, 2a.) As the court below held (Pet. 2a–3a), the trial judge properly left the question of substantiality to the jury upon instructions that "substantial amount * * * cannot be defined in absolute terms" but "depends upon the facts and circumstances in each case." *United States* v. *Nunan, supra.* Petitioner, apparently, does not now object to the correctness of the response, but asserts that the trial judge erred prejudicially in accompanying his answer with an observation (Pet. 22) as to why the question was asked. There is no merit in this assertion. The jury itself, by its questions, plainly revealed what the course of its deliberations had been and the trial judge merely summarized the obvious situation. It would be unreasonable to regard the court's observation as in any way prejudicial to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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